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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1958.

No. 583

HENRY NAPUE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT.

The Question Presented.

The question presented is:

PETITIONER WAS CONVICTED OF MURDER UPON, *INTER ALIA*, THE TESTIMONY OF AN ACCOMPLICE WHO FIRST DENIED, THEN ADMITTED, THAT HE HAD BEEN PROMISED A RECOMMENDATION OF LENIENCY FOR HIS TESTIMONY. HOWEVER, THE WITNESS FALSELY TESTIFIED THAT THE PROMISE WAS MADE BY AN ASSISTANT PUBLIC DEFENDER, IT HAVING IN FACT BEEN MADE BY THE ASSISTANT STATE'S ATTORNEY PROSECUTING THE

CASE. THE TRIAL COURT AND THE SUPREME COURT OF ILLINOIS HAVE DETERMINED THAT PETITIONER'S CONVICTION COULD NOT IN ANY LIKELIHOOD HAVE BEEN THE RESULT OF THE WITNESS' FALSEHOOD AS TO THE IDENTITY OF THE AUTHOR OF THE PROMISE. DOES PETITIONER'S CONVICTION AND IMPRISONMENT DEPRIVE HIM OF LIBERTY WITHOUT DUE PROCESS OF LAW?

STATEMENT OF THE CASE.

Petitioner's Statement of the Case is accurate but in our opinion is so far incomplete that the Court's convenience will best be served by a restatement of the case even though that restatement involves some repetition of matters set forth in petitioner's Statement of the Case and in the opinion of the Supreme Court of Illinois.

In June, 1940, petitioner was indicted in the criminal court of Cook county, Illinois, for a murder alleged to have been committed in 1938 (Rec. 16).

It appears that at about 3:00 o'clock in the morning of August 21, 1938, four Negroes entered a cocktail lounge in Chicago. All of the men were armed. One George Hamer, a confessed participant in the affray and slaying, identified petitioner, one Howard Poe and one Trussie Townsend, as the three other participants (Rec. 16-17).

According to Hamer, one of the men, not Hamer, announced that it was a stickup and immediately there began a wild melee of shooting. Patrick O'Malley, a Chicago police officer who was off duty at the time and in civilian attire, drew his service revolver and shot as often as the bullets in his gun would permit. According to Hamer, petitioner, Poe and Townsend returned Officer O'Malley's fire, Hamer was caught in the cross fire, Townsend was shot and killed and Officer O'Malley was mortally wounded, dying from the effects of his wounds nine days later.

In the meantime, according to Hamer, Napue and Poe helped Hamer out of the rear of the cocktail lounge, where one Lucius Webb was waiting at the wheel of an automobile. Hamer was taken to the office of a Dr. Fred B. Steinberg, who rendered first aid and called the police. According to Hamer, petitioner, Poe and Webb left the doctor's office (Rec. 17). Some days later, after Hamer had recovered from the shock of the wound in his chest, he told police officers of his participation in the attempted robbery and named petitioner, Poe and Townsend as his accomplices.

Shortly afterwards Hamer was questioned by Morris G. Meyers, who was then an assistant state's attorney of Cook county, Illinois. In his statement to Meyers, Hamer said in substance that he went for an automobile ride with petitioner, Poe, Webb and Townsend and was not told that they were embarking upon a robbery. He saw no guns until the car pulled in the alley, when for the first time Poe thrust a shotgun in his hands and told him he had to come along. Instructed to stand by the front door, he tried to get out the front door as soon as the shooting began, found it locked, dropped his gun, ran toward the rear, was shot through the chest, helped out in the car and left at Dr. Steinberg's office.

The proprietors of the cocktail lounge confirmed Hamer's claim that he did no shooting.

Identification in the cocktail lounge at the time of the shooting was difficult because it was poorly lighted.

Hamer, petitioner, Poe and Webb were subsequently indicted, largely upon Hamer's confession (Rec. 18).

On February 20, 1939, Hamer pleaded guilty to robbery and was sentenced to the Illinois State Penitentiary for 199 years (Rec. 19-20).

Meyers deposes that after Hamer was sentenced to the penitentiary, he (Meyers), "well knowing that identification of Poe, Napue and Webb if and when apprehended would be of an unsatisfactory character and not the kind of evidence upon which a jury could be asked to inflict a proper, severe penalty, and being unable to determine in advance whether Poe, Napue and Webb would make confessions of their participation in the crime, represented to Hamer that if he would be willing to cooperate with law enforcing officials upon the trial of trials of Poe, Napue and Webb when they were apprehended, that a recommendation for a reduction of his sentence would be made and, if possible, effectuated. Hamer at that time unhesitatingly expressed a complete willingness to cooperate at any time he would be called upon." (Rec. 19.)

Some months thereafter, the date not being shown by the record, Poe was apprehended, made a full confession of his participation in the shooting, substantially corroborating Hamer, admitted firing some shots in the cocktail lounge and admitted that he, together with petitioner and other persons (not including Hamer) had held up several other taverns. Poe had a long criminal record (Rec. 19). He was found guilty of murder by a jury and his punishment was fixed at death. He was executed on April 19, 1940.

Several months later, petitioner was apprehended and returned to Chicago. According to Meyers, to whose affidavit in support Hamer's petition for a writ of *coram nobis* petitioner refers, petitioner "readily admitted his part in the crime and signed a confession wherein he, too, in substance confirmed what Hamer had previously stated, that Hamer was an unwilling participant in the attempted robbery." (Rec. 20.)

In the meantime, Mrs. Neeley, one of the proprietors of the cocktail lounge, had moved to California, and, accord-

ing to Meyers, her identification of petitioner "would be at best highly questionable." (Rec. 20.)

Petitioner was subsequently tried for the murder of Officer O'Malley.

The record does not show whether petitioner's confession was or was not used at his trial.

At petitioner's trial, Hamer testified in the language set forth in petitioner's brief at pages 5 through 7. We do not reproduce the transcript of Hamer's testimony. Suffice is to say that Hamer, after having testified, "There ain't nobody promised me anything", (Rec. 3), further testified that a lawyer from the Public Defender's office whom he could not identify had told the witness that "he, the lawyer, was going to do what he could" for the witness and that he "was trying to get something did for me," (Rec. 4). He testified that Meyers had not promised to "recommend a reduction of sentence to anybody." (Rec. 5.)

Petitioner was convicted and was sentenced to imprisonment in the Illinois penitentiary for 199 years.

As appears from petitioner's Statement of the Case, Meyers resigned his position as assistant State's attorney and filed a petition in the nature of a writ of error *coram nobis* in the criminal court of Cook county on behalf of Hamer, in which petition Meyers disclosed the facts above narrated with respect to Hamer's testimony that Meyers had promised him nothing, whereas Meyers had in fact, according to his affidavit, promised to recommend a reduction of his sentence if he would testify against petitioner and the other defendants.

Upon the hearing in the *coram nobis* proceeding, Benjamin Morgan, a police officer, testified that after petitioner's arrest, petitioner "reenacted the crime". (Rec. 61.)

The trial court denied petitioner relief, stating *inter alia*, in an oral opinion that "We have the confession of Napue (petitioner) plus the testimony—or the evidence at least in this record, that the others also were present." (Rec. 67.)

Upon writ of error the Supreme Court affirmed the denial of petitioner's prayer for relief. The court said in its opinion (Rec. 72):

> "In the case at bar the evidence at the post-conviction hearing leaves little doubt that the prosecutor had promised Hamer if he would give testimony against Napue his cooperative actions would be brought to the attention of the appropriate authorities, to effectuate, if possible, a reduction in his sentence. This would be his reasonable understanding of the statements made by the prosecutor, and the State does not here deny that such a promise was made. Hamer's testimony to the effect that no promise had been given to him was clearly untrue, and had there been no disclosure of its falsity the petitioner's contention would raise a serious constitutional question. Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made on his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof. We think, therefore, that under the circumstances of this case the trial court was warranted in concluding there was no constitutional infirmity by virtue of the false statement."

Justice Schaefer and Davis dissented from the opinion (Rec. 73-76).

ARGUMENT.

I.

The courts of Illinois have given due and appropriate consideration to Hamer's false testimony that the assistant State's attorney had promised him nothing and have found with full basis in the record that petitioner's conviction was not due to that falsehood. Therefore petitioner's imprisonment does not deny him due process of law.

The Supreme Court of Illinois has given full consideration in this case to the rule that a conviction obtained by testimony known to the prosecution to be false denies due process of law. That court said in its opinion (Rec. 71):

> "Where a conviction is obtained by the presentation of testimony known by the prosecuting authorities to be perjured, the constitutional requirement of due process is not satisfied. (*Pyle* v. *Kansas*, 317 U. S. 213, 87 L. ed. 214; *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. ed. 791.) To show a denial of due process within the meaning of this rule it is not necessary that the false testimony be concerned directly with the question of guilt. Even though it bears only upon the credibility of a witness, it may have the effect of depriving the accused of a fair trial."

The court then declared (Rec. 71):

> "Whether such effect is present depends, of course, upon the circumstances of the particular case."

It does not appear whether at petitioner's original trial his confession was or was not used against him. Nor does it appear what other evidence for or against him was adduced at the trial.

It was incumbent upon petitioner to demonstrate, not, of course, that an acquittal would have resulted had the jury been apprised that it was Meyers, the prosecutor, and not a member of the Public Defender's staff, who made the readily admissed promise to intercede for him if he should testify for petitioner, but at least that there was such reasonable likelihood that such falsity, if disclosed, would have altered the verdict as to permit the conclusion that the false testimony was such a substantial factor in petitioner's conviction as to warrant the conclusion that due process was denied.

In resolving the question whether Hamer's false statement that it was a member of the Public Defender's staff and not the prosecuting attorney who had made the admitted promise, the Supreme Court of Illinois said in its opinion (Rec. 72):

> "Hamer's testimony to the effect that no promise had given to him was clearly untrue, and had there been no disclosure of its falsity the petitioner's contention would raise a serious constitutional question. Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made on his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof. We think, therefore, that under the circumstances of this case the trial court was warranted in concluding there was no constitutional infirmity by virtue of the false statement."

The Supreme Court of Illinois, sustaining the trial court, took full cognizance of fact that the jury was apprised that Hamer's initial claim that he was promised nothing was false and that in fact he was testifying in the hope, induced by a promise of recommendation for

reduction of his sentence, or personal advantage. That court held that petitioner's conviction could not in any reasonable likelihood have been the result of Hamer's naming an assistant public defender, rather than an assistant State's attorney as the author of the promise of a recommendation of leniency.

It fairly appears from the entire record that petitioner admitted his guilt in a confession that he does not assail. It does not appear that he ever denied his guilt. It appears that he reenacted the commission of his crime.

The fact that Hamer had first testified falsely that he had no expectation of reward was known to the jury that convicted petitioner.

This Court's decision most nearly pertinent to the present case is *Hysler* v. *Florida*, 315 U. S. 412. In that case, as in this case, the petitioner had been convicted of complicity in a murder upon evidence that included the testimony of an accomplice. In that case, the petitioner "petitioned the Supreme Court of Florida for permission to apply to the Circuit Court of Duval County, Florida, (the court before which he was originally tried) for writ of error *coram nobis*." Such leave was denied.

A majority of this Court read the opinion of the Supreme Court of Florida as canvassing the questions of fact precipitated in that case and as a resolution of those questions adverse to Hysler. In this case there is no doubt that the Supreme Court of Illinois decided the question of fact: Did Hamer's falsification as to the identity of the author of a promise of recommendation of reduced sentence, the fact of the promise having been known to the jury, deprive petitioner of the substance of a fair trial within the purview of due process?

In the *Hysler* case this Court, speaking of Florida's writ of error *coram nobis*, said, at page 415:

> "This common law writ, in its local adaptation, is Florida's response to the requirements of *Mooney* v. *Holohan*, 294 U. S. 103, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process."

The Court said at pages 416-417:

> "Such a state procedure of course meets the requirements of the Due Process Clause . . . Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury."

In the *Hysler* case this Court held that where the Supreme Court of Florida canvassed the record and, giving due regard to *Mooney* v. *Holohan*, 294 U. S. 103, determined that petitioner had not been deprived of the essential substance of a fair trial, petitioner had not been denied due process of law. This Court affirmed the judgment of the Supreme Court of Florida.

In the instant case it appears that petitioner had admitted his guilt in a confession that he does not assail in this Court, that he had readily reenacted the crime, and that Hamer had admitted that he was testifying in the hope of eventual lenity. The only question was whether upon such a record, Hamer's falsehood as to the identity of the author of the promise of a recommended sentence could in any reasonable likelihood have affected the judgment of the jury. That question was resolved adversely to petitioner by the trial and Supreme Courts of Illinois.

It is worthy of note that the dissenting opinion in the *Hysler* case was premised upon the view that the Supreme Court of Florida had not considered the questions of fact presented in that case.

In this case the Supreme Court of Illinois, according due and appropriate consideration to the prosecutor's concealment of Hamer's false statement that it was a member of the Public Defender's staff rather than the prosecuting attorney who had promised to recommend leniency for Hamer in exchange for their testimony and fully respecting this Court's decision in the *Mooney* and subsequent cases, has determined that the misstatement as to the identity of the author of the promise could not have deprived petitioner of the substance of a fair trial.

It is respectfully submitted that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, William C. Wines, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 17th day of April, 1959, I served copies of the foregoing Brief for Respondent as follows:

By delivering five copies of said Brief for Respondent to:

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